STATEMENT OF

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BEFORE THE

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ON

THE FREEDOM OF INFORMATION ACT

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Mr. Chairman, Members of the Select Committee on Intelligence, I am pleased to have this opportunity to appear before you today to discuss the Freedom of Information Act's impact on the Intelligence Community. I have been giving considerable thought to the particularly serious problems being experienced by the Central Intelligence and National Security Agencies under the FOIA. I am convinced that there is an inherent contradiction in the application of a statute designed to assure openness in Government to agencies whose work is necessarily secret, and that the adverse consequences of this application have caused intelligence functions to be seriously impaired without significant counterbalancing of public benefit. Mr. Chairman, I believe that it is time to reexamine the fundamental question of whether it makes sense for the FOIA to be applicable to our Nation's two most sensitive intelligence agencies.

The Freedom of Information Act was first passed in 1966. President Johnson described the Act as stemming from the principle that "a democracy works best when the people have all the information that the security of the Nation permits." The declared purpose of the Act was to broaden access to government information connected with activity impacting upon the public, with certain exceptions in areas in which Congress believed exemptions were warranted in the national interest. During the post-Watergate period of pressure for more openness in government, amendments to the FOIA were enacted over President Ford's veto against a background of allegations that Federal agencies were frustrating the intent of the Act through delaying tactics, the unreasonable assessment of fees, and the wholesale invoking of exemptions. The Supreme Court's decision in EPA v. Mink, however, was the key impetus for the amendments. The

Supreme Court had ruled that an agency must examine classified documents before invoking the FOIA exemption permitting such documents to be withheld from disclosure, but that it was not for the courts to rule on whether the classification itself might be unwarranted.

Prior to the 1974 amendments, the Central Intelligence Agency had received virtually no FOIA requests, and no litigation had been initiated against the Agency in connection with any denial of release of information under the classified documents exemption. The 1974 amendments made several fundamental changes in the Act, the most notable of which were:

1) Reasonably segregable portions of a document not falling under the Act's exemptions were required to be provided to the requester; and

2) The courts were given authority to review agency determinations that records were withholdable under the Act. This has resulted in an increasing tendency on the part of the courts to second-guess the judgment of professional intelligence officers that information is properly classified in order, for example, to protect the identity of intelligence sources.

These amendments led to an explosion in FOIA requests directed at the CIA, and a corresponding increase in associated litigation. Resources and manpower devoted to FOIA matters have, of course, increased tremendously since the mid-1970's. The CIA's latest annual report on its administration of the Act contains the following statistics for calendar year 1980:

-- 1212 new FOIA cases were logged during 1980.

-- 257,420.5 actual man-hours of labor (or 144 man-years) were devoted to the processing of Freedom of Information Act, Privacy Act, and mandatory classification review requests, appeals, and litigation, as compared with the 110 man-years of labor devoted in 1979. More than half of these resources were devoted to the processing of requests for subject matters information under the FOIA.

-- Over $3 million was expended in personnel costs for processing, appeals, and litigation related to these requests. About two-thirds of this amount was spent on FOIA cases.

Mr. Chairman, the money and manpower currently being devoted to FOIA matters could certainly be utilized more productively in substantive intelligence pursuits, but I want to be sure that it is understood that gross personnel and resources figures, as significant as they are, are not the most important aspects of the FOIA problem for the intelligence agencies. Other government agencies may receive more FOIA requests, spend more time and money, and devote more manpower to FOIA, but they are not intelligence agencies. The problems besetting CIA and NSA under the Act are unique because their missions are unique, and these problems cannot be solved by an infusion of money or manpower to deal with FOIA requests.

The search and review of records in response to FOIA requests poses a special set of problems for the Central Intelligence Agency. The CIA's records systems are an integral part of the Agency's security system to protect sensitive intelligence information. The need to protect intelligence sources and methods through a complex system of compartmented and decentralized records is in direct conflict with the concept of openness under the FOIA. Because a primary CIA mission is to gather information, its records systems are constructed to support that mission, and thus, the search for records in response to an FOIA request becomes uniquely difficult. These records, which number hundreds of millions of pages, are compartmented and segregated along operational and functional lines. Several components have multiple records systems. Thus, the search for information responsive to an FOIA request is a demanding and

time-consuming task. A relatively simple request may require as many as 21 Agency record systems to be searched, a difficult request over 100. The "need to know" principle, also, means that CIA employees normally have access only to information necessary to perform their assignments. Thus, in the process of searching for documents in response to an FOIA request, people who would otherwise never have access to compartmented information necessarily see such documents.

But, Mr. Chairman, it is not the quantity of time and effort devoted to this process that is the ultimate concern to us. It is rather the level of employee who must become involved in the review process. By this I mean the types of people who must participate in FOIA processing and the impact which this involvement has on the ability of these intelligence officers to carry out their intelligence collection or analytical assignments.

When we surface information in response to an FOIA request, the documents must be carefully reviewed in order to determine which information can be released safely and which must be withheld, in accordance with applicable FOIA exemptions, in order to protect matters such as the security of CIA operations or the identities of intelligence sources. In most other government agencies the review of information for possible release under the FOIA is a routine administrative function; in the Central Intelligence Agency it can be a matter of life or death for human sources who could be jeopardized by the release of information in which their identities might be exposed. In some circumstances mere acknowledgment of the fact that CIA has any information on a particular subject could be enough to place the source of that information in danger.

It must be remembered that the primary mission of the CIA is intelligence gathering, an activity which frequently takes place in a hostile environment, and which must take place in secrecy. The mere disclosure that the CIA has engaged in a particular type of activity or acquired a particular type of information can compromise ongoing intelligence operations, cause the targets of CIA's collection efforts to adopt countermeasures, or impair relations with foreign governments. Agency records must be scrutinized with great care because bits of information which might appear innocuous on their face could possibly reveal sensitive information if subjected to sophisticated analysis or combined with other information available to FOIA requesters.

This review is not a task which can be entrusted to individuals hired specifically for this purpose, as is the case with many other government agencies whose information has no such sensitivity. The need for careful professional judgment in the review of CIA information surfaced in response to FOIA requests means that this review requires the time and attention of intelligence officers whose primary responsibilities involve participation in, or management of, vital programs of intelligence collection and analysis for the President and our foreign policymaking establishment. Experienced operations officers and analysts are not commodities which can be purchased on the open market. It takes years to develop first-class intelligence officers. Again, let me emphasize that these reviewing officers are not FOIA professionals, they are intelligence officers who are being diverted from their primary intelligence duties. This diversion is impacting adversely upon the ability of the Agency to fulfill its vital intelligence mission.

Mr. Chairman, efforts to fulfill our intelligence mission while subject to the provisions of the FOIA have placed the CIA in a vicious cycle. Intelligence information must be processed and analyzed quickly if the President, the Cabinet, and the Congress are to receive the latest and most accurate assessments of foreign developments. The need for up-to-the-minute information frequently prevents the review of FOIA documents from taking place in keeping with the time requirements of the Act. This results in the Agency being sued for failure to comply with the Act, which, in turn, requires an even greater amount of time and effort to be expended in the litigation process. The defense of such suits, as well as those that are brought because of a denial of the information requested, requires the time and effort of numerous personnel, including intelligence officers directly concerned with the request in question. Thus, these intelligence officers are again diverted from their primary intelligence duties and put even further behind in reviewing other FOIA documents. Therefore, despite an increase in the manpower devoted to FOIA review in 1980, the backlog of unanswered requests increased by 400 cases. Mr. Chairman, when the work of senior intelligence officers is diverted to FOIA concerns because information must be reviewed, or because court affidavits must be prepared under strict time constraints to justify a delayed response or a previous denial of information, the ability of our Nation to formulate an informed and successful foreign policy suffers. This is not a healthy situation. The diversion of senior management time and attention from primary tasks to FOIA matters, particularly in connection with litigation, is of especially great concern to me.

The CIA has been sued for denying FOIA requests in 198 lawsuits. The conduct of this litigation involves not only an enormous amount of lawyer time at the Agency and the Department of Justice but since the factual submissions must be presented by substantive intelligence officers by way of affidavits and depositions and the like, the litigation process places an enormous burden on people who should be doing other things. Yet all this activity in court has, with almost no exception, resulted in a judicial affirmance of CIA and NSA claims of national security exemptions. However, the fact remains that judges with no expertise in the arcane business of intelligence may believe that under the provisions of the Act they can overrule an intelligence agency's decision as to the classification of particular documents and order their release. My colleague, Lieutenant General Faurer, is addressing this problem in some detail. In one case involving CIA records a district court judge has specifically overruled a CIA classification determination and the Court of Appeals has upheld this ruling. A petition for a rehearing on this case is now pending.

While we are proud of our excellent record in court because it illustrates both the seriousness of our attitude toward compliance with the FOIA's provisions and the quality of our legal work, we cannot be certain that we will continue to be as successful in the future as we have been in the past. However, our litigation record has been achieved at an enormous cost in the kind of quality resources which I described earlier. I cannot help but wonder, Mr. Chairman, how much better our intelligence product might have been in some key areas had the time and effort devoted to FOIA litigation by senior intelligence officers been focused instead on crucial intelligence missions.

Mr. Chairman, I would like to add one other point which is related to the FOIA process. The Freedom of Information Act currently contains exemptions for classified documents and other matters that are set forth as exempt from disclosure. These exemptions have generally been adequate to protect sensitive national security information. But, even with the kind of quality resources we devote to the review process, human error is always a possibility. Such errors have in fact occurred, resulting in the inadvertent disclosure of sensitive CIA and NSA information. These unintentional disclosures are constant reminders of the risk which will be present so long as these agencies are subject to the Act. The handling of FOIA requests involving CIA and NSA information by other agencies has also resulted in some serious compromises of classified information relating to intelligence sources and methods. Compoundng these problems are attempts by requesters to gain additional classified information based upon these compromises.

Mr. Chairman, the FOIA further impedes the CIA's ability to do its job through the perception it has created overseas. While the perception of CIA's inability to keep secrets may be caused by leaks, unreviewed publications by former officials and the like, it is the FOIA that is viewed as the symbol of this problem. Individual human sources and foreign intelligence services are aware of the Act, and view it as a threat to the Agency's ability to maintain the confidentiality of its sources, and to protect the information they provide. An intelligence agency cannot operate effectively under such conditions. Human intelligence is as important today as it has ever been in the history of this Nation. To obtain this intelligence it is vital that there be confidence in the ability of the United States Government to honor assurances of secrecy. It must be

remembered that many individuals who cooperate with the intelligence efforts of the United States do so at great personal risk. Identification as a CIA agent can ruin a career, endanger a family, or even lead to imprisonment, torture, or death. We must be able to provide human sources with absolute assurance that the fact of their cooperation with the United States will forever be kept secret and that the information they provide will never be revealed or attributed to them. The FOIA has raised doubts about our ability to maintain such commitments, despite our explanations that the Act provides exemptions which allow for the safekeeping of sensitive information. The concept of an intelligence agency being subject to an openness in government law is not uniformly understood by individuals and intelligence services abroad. It has been necessary to spend a great deal of time attempting to convince foreign intelligence services that they should not discontinue their liaison relationships with us because of the FOIA. The very fact that CIA files are subject to search and review for information which is releasable is extremely disturbing to our sources. There have been many cases in which individuals have refused to cooperate with us, diminished their level of cooperation with us, or totally discontinued their relationship with our people in the field because of fears that their identities might be revealed through an FOIA release. What we will never know, Mr. Chairman, is how much valuable information has been lost to the United States due to the reluctance of potential human sources to even begin a relationship.

Mr. Chairman, I believe it is absolutely clear that the FOIA is impairing our nation's intelligence efforts. The minimal benefit accruing to the public from application of the FOIA to the Central Intelligence and National Security Agencies is simply not worth the

cost to the effectiveness of these agencies. Let us ask ourselves some basic questions about the FOIA's application to the intelligence agencies.

First, does the application of the FOIA to CIA and NSA fulfill the Act's fundamental purpose of giving the American people greater access to information about the workings of government which affect their daily lives? The answer to this question is no, because our intelligence activities are focused on the acquisition of information abroad and its analysis for foreign policymakers.

It might be asked whether the application of the FOIA to CIA and NSA serves a useful informing function. Again, the answer is no. Information which is released under the Act is generally extremely fragmentary and it can often be misleading. Mr. Chairman, I would note that certain organizations have published lists of books and articles said to be of public interest which supposedly were based on information released by intelligence agencies under the FOIA. The argument is made that these materials could not have been published without the FOIA. I believe that such claims are grossly exaggerated. The FOIA has not resulted in the revelation of fundamental information but has instead been used to garner additional details about subject matter which was originally either revealed by one of the intelligence agencies on its own, or in the course of investigations such as those conducted by the Rockefeller Commission or the Church Committee.

Mr. Chairman, one of the purposes of the Freedom of Information Act is to provide the American public with a mechanism by which they can know how government agencies are carrying out their functions. This leads to another question: Isn't the FOIA needed to provide public oversight of the intelligence agencies, in order to ensure

that the abuses and excesses of the past do not recur? Mr. Chairman, the FOIA has never been an effective oversight mechanism for the CIA or NSA, and the idea that it should apply to these agencies for such purposes ought to be laid to rest once and for all. The fragmentary information obtainable under the FOIA has not, cannot, and will not ever remotely compare in value with the congressionally established oversight responsibility which lies with this Committee and its companion committee in the House. These two committees are specifically responsible for overseeing the funding and operations of the various intelligence agencies. I believe that it is fair to say that no other agencies in the Government are subject to such close congressional scrutiny on a permanent, ongoing basis. It is this system of vigilant and effective congressional oversight, along with extensive Executive branch review mechanisms, which provides the means through which the American people are assured that the operation of their intelligence agencies is in accordance with applicable law.

Mr. Chairman, the President has stated his determination to enhance the Nation's intelligence capabilities, and I have pledged to work toward achieving that goal. To do this, the CIA and NSA must be able to focus their energies on the timely and accurate gathering and analysis of information in a manner which insures the secrecy of the sources and content of that information. For the reasons I have stated, I believe the current application of the FOIA to the CIA and NSA is inappropriate, that it is detrimental to the accomplishment of intelligence missions and that it is unjustified by its insignificant public benefit.

Mr. Chairman, what is to be done? I want to make clear that I am firmly convinced that CIA and NSA problems under the FOIA cannot be

substantially alleviated by strengthening the grounds upon which information can be withheld from public disclosure under the Act. Senator Chafee's Bill, S. 1273, takes a different, more promising approach in its effort to seal off certain categories of files from the entire FOIA process, including search and review. I believe that Senator Chafee's Bill, if enacted, would have a major positive impact. But Mr. Chairman, I also believe that the time has come for the Congress to face the issue squarely and definitively, and to recognize that only a total exclusion of records created or maintained by the Central Intelligence Agency and the National Security Agency from all of the Freedom of Information Act's requirements can, by completely eliminating the need to search and review records in response to FOIA requests, end the wasteful and debilitating diversion of resources and critically needed skills, eliminate the danger of court-ordered release of properly classified information, and regain the confidence of human sources and foreign intelligence services.

Mr. Chairman, I would like to add one footnote to my testimony before you today. Nothing which I have said should be construed to indicate any lessening in our belief that individual Americans should continue to be able to determine whether or not an intelligence agency holds information on them, and to obtain this information when security considerations permit. I wish to state categorically that CIA and NSA would continue full compliance with the Privacy Act even if these agencies were to be totally excluded from the FOIA.